TL 2183

IPJET

INTERNATIONAL PLATFORM
OF JURISTS
FOR EAST TIMOR

NEWSLETTER

Nr 6 10 October 1995

The East Timor Case before the International Court of Justice (concl.)

On the 30 June 1995 the International Court of Justice handed down its decision in the case. Whilst the decision was not in favour of Portugal, readers will see from the commentaries of three IPJET members (Iain Scobbie, James Dunn and Pedro Pinto Leite) that it is a positive one for East Timor.

THE JUDGEMENT:

We include here the last 18 paragraphs (the first 20 contain the procedural history, a historical background and a summary of the contentions of the parties):

"(...)

21. The Court will now consider Australia's objection that there is in reality no dispute between itself and Portugal. Australia contends that the case as presented by Portugal is artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent is Indonesia, not Australia. Australia maintains that it is being sued in place of Indonesia. In this connection, it points out that Portugal and Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute, but that Indonesia has not.

In support of the objection, Australia contends that it recognizes, and has always recognized, the right of the people of East Timor to self-determination, the status of East Timor as a non-self-governing territory, and the fact that Portugal has been named by the United Nations as the administering Power of East Timor; that the arguments of Portugal, as well as its submissions, demonstrate that Portugal does not challenge the capacity of Australia to conclude the 1989 Treaty and that it does not contest the validity of the Treaty; and that consequently there is in reality no dispute between itself and Portugal.

Portugal, for its part, maintains that its Application defines the real and only dispute submitted to the Court.

22. The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No.* 2, p. 11; *Northern Cameroons, I.C.J. Reports 1963*, p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988*, p. 27, para. 35). In order to establish the existence of a dispute, "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 328); and further, "whether there exists an international dispute is a matter for objective

determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 74).

For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

On the record before the Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question whether the conduct of Australia in negotiating, concluding and initiating performance of the 1989 Treaty was in breach of an obligation due by Australia to Portugal under international law.

Indeed, Portugal's Application limits the proceedings to these questions. There nonetheless exists a legal dispute between Portugal and Australia. This objection of Australia must therefore be dismissed.

23. The Court will now consider Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. The declarations made by the Parties under Article 36, paragraph 2, of the Statute do not include any limitation which would exclude Portugal's claims from the jurisdiction thereby conferred upon the Court. Australia, however, contends that the jurisdiction so conferred would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. Portugal agrees that if its Application required the Court to decide any of these questions, the Court could not entertain it. The Parties disagree, however, as to whether the Court is required to decide any of these questions in order to resolve the dispute referred to it.

24. Australia argues that the decision sought from the Court by Portugal would inevitably require the Court to rule on the lawfulness of the conduct of a third State, namely Indonesia, in the absence of that State's consent. In support of its argument, it cites the judgment in the case of the *Monetary Gold Removed from Rome in 1943*, in which the Court ruled that, in the absence of Albania's consent, it could not take any decision on the international responsibility of that State since "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32).

25. In reply, Portugal contends, first, that its Application is concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia. According to Portugal, such conduct of Australia in itself constitutes a breach of its obligation to treat East Timor as a non-self-governing territory and Portugal as its administering Power; and that breach could be passed upon by the Court by itself and without passing upon the rights of Indonesia. The objective conduct of Australia, considered as such, constitutes the only violation of international law of which Portugal complains.

26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the judgment given by the Court in the case of the *Monetary Gold Removed from Rome in 1943* and confirmed in several of its subsequent decisions (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1984*, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1984*, p. 431, para. 88;

Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986, p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), I.C.J. Reports 1990*, pp. 114-116, paras. 54-56 and p. 112, para. 73; and *Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, pp. 259-262, paras. 50-55).

27. The Court notes that Portugal's claim that, in entering into the 1989 Treaty with Indonesia, Australia violated the obligation to respect Portugal's status as administering Power and that of East Timor as a non-self-governing territory, is based on the assertion that Portugal alone, in its capacity as administering Power, had the power to enter into the treaty on behalf of East Timor; that Australia disregarded this exclusive power, and, in so doing, violated its obligations to respect the status of Portugal and that of East Timor.

The Court also observes that Australia, for its part, rejects Portugal's claim to the exclusive power to conclude treaties on behalf of East Timor, and the very fact that it entered into the 1989 Treaty with Indonesia shows that it considered that Indonesia had that power. Australia in substance argues that even if Portugal had retained that power, on whatever basis, after withdrawing from East Timor, the possibility existed that the power could later pass to another State under general international law, and that it did so pass to Indonesia; Australia affirms moreover that, if the power in question did pass to Indonesia, it was acting in conformity with international law in entering into the 1989 Treaty with that State, and could not have violated any of the obligations Portugal attributes to it. Thus, for Australia, the fundamental question in the present case is ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia.

28. The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.

29. However, Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case of the *Monetary Gold Removed from Rome in 1943* is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *Western Sahara, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the

lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.

30. Portugal presents a final argument to challenge the applicability to the present case of the Court's jurisprudence in the case of the *Monetary Gold Removed from Rome in 1943*. It argues that the principal matters on which its claims are based, namely the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by the General Assembly and the Security Council, acting within their proper spheres of competence; that in order to decide on Portugal's claims, the Court might well need to interpret those decisions but would not have to decide *de novo* on their content and must accordingly take them as "givens"; and that consequently the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory.

Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; that the last resolution of the Security Council on East Timor goes back to 1976 and the last resolution of the General Assembly to 1982, and that Portugal takes no account of the passage of time and the developments that have taken place since then; and that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms.

31. The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)".

Nor is it at issue between the Parties that the General Assembly has expressly referred to Portugal as the "administering Power" of East Timor in a number of the resolutions it adopted on the subject of East Timor between 1975 and 1982, and that the Security Council has done so in its resolution 384 (1975). The Parties do not agree, however, on the legal implications that flow from the reference to Portugal as the administering Power in those texts.

32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes, furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory. Finally, the Court observes that, by a letter of 15 December 1989, the Permanent Representative of Portugal to the United Nations transmitted to the Secretary-General the text of a note of protest addressed by the Portuguese Embassy in Canberra to the Australian Department of Foreign Affairs and Trade on the occasion of the conclusion of the Treaty

on 11 December 1989; that the letter of the Permanent Representative was circulated, at his request, as an official document of the forty-fifth session of the General Assembly, under the item entitled "Question of East Timor", and of the Security Council; and that no responsive action was taken either by the General Assembly or the Security Council.

Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.

33. It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources.

34. The Court emphasises that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case. Thus, in the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, it stated, *inter alia*, as follows:

"In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application ... In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. ... In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (*I.C.J. Reports 1992*, pp. 261-262, para. 55.)

However, in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (*Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 32).

35. The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent. This conclusion applies to all the claims of Portugal, for all of them raise a common question: whether the power to make treaties concerning the continental shelf resources of East Timor belongs to Portugal or Indonesia, and, therefore, whether Indonesia's entry into and continued presence in the Territory are lawful. In these circumstances, the Court does not deem it necessary to examine the other arguments derived by Australia from the non-participation of Indonesia in the case, namely the Court's lack of jurisdiction to decide on the validity of the 1989 Treaty and the effects on Indonesia's rights under that treaty which would result from a judgment in favour of Portugal.

36. Having dismissed the first of the two objections of Australia which it has examined, but upheld its second, the Court finds that it is not required to consider Australia's other objections and that it cannot rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play.

37. The Court recalls in any event that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.

38. For these reasons,

THE COURT,

By 14 votes to 2,

Finds that it cannot in the present case exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar-Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin; *Judge* ad hoc Sir Ninian Stephen;

AGAINST: *Judge* Weeramantry; *Judge* ad hoc Skubiszewski.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirtieth day of June, one thousand nine hundred and ninety-five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Portuguese Republic and the Government of the Commonwealth of Australia, respectively.

(*Signed*) Mohammed BEDJAOUI, President.

(*Signed*) Eduardo VALENCIA-OSPINA, Registrar.

Judges ODA, SHAHABUDDEEN, RANJEVA and VERESHCHETIN append separate opinions to the Judgment of the Court.

Judge WEERAMANTRY and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court."

Comments by Dr. Iain Scobbie
(Senior lecturer in International Law, Law School, University of Glasgow)

The International Court of Justice (ICJ) decision in the East Timor case is encouraging. Although the court refused to entertain the case on a technical procedural point, it made a clear substantive ruling on the essential point - that the East Timorese People has a right to self determination.

Given that it decided that the case could not proceed to merits because of Indonesian interests, this ruling on self determination was strictly unnecessary. That the court chose to declare that East Timor has not accomplished self determination demonstrates that the court desired to place this on record as a judicial determination after hearing full argument on the point.

Moreover the terms of the ruling are striking. Self determination is described as a right ERGA OMNES - that is binding on all states. This indicates that the court's determination extends to Indonesia. Although the court decided in favour of Australia, this ruling endorses the key point of the Portuguese argument.

In essence, although Australia can claim that it won the case, it lost on this crucial human rights question. The judgement will also give guidance to UN Human Rights bodies in dealing with East Timor. The judgement is positive and a cause for some celebration.

Glasgow, 30 June 1995

The ICJ Decision - A Pyrrhic Victory

by James Dunn

There is something unseemly, even distasteful, about Senator Evan's triumphant reaction to last Friday's decision by the International Court of Justice on the Timor Gap Treaty. In doing so he misrepresented the real meaning of the Court's decision. It did not endorse the conclusion of this Treaty, which in effect neatly handed over to Indonesia resources rightly belonging to East Timor. Essentially the ICJ finding was that it could not pass judgement on a treaty involving Indonesia, simply because that country refuses to accept its jurisdiction.

In short the Court has declared that it is powerless to pass judgement on the principles at stake in the concluding of the Timor Gap Treaty. There is, however, a positive message in the way it deliberately drew attention to the fact that East Timor remains a "non-self-governing territory" whose people have yet to exercise their right to self- determination. In effect the Court was denying Indonesia's claim to have legally integrated the territory which, it could be argued, implicitly questions the legal integrity of the Treaty.

After having avoided use of the term for some time Senator Evans is now at pains to point out that his government also acknowledges the Timorese right to self-determination, despite its formal (de jure) recognition of Indonesia's integration of the territory. But this is surely a totally contradictory formula which the Government is now using to keep its feet in both camps, as it were. In short Australia cannot recognise East Timor as legally a part of Indonesia and, in the same breath, claim that the Timorese have the right not be part of Indonesia.

This issue was in fact included in Australia's case before the ICJ, where eminent Australian counsel argued that this country has long supported East Timor's right to self- determination, including back in 1975, when the territory was seized by Indonesia. In practice it was a sheer nonsense, a patently and cynically false way of embellishing our irresponsible past. True, we did mention the word occasionally in the mid-seventies for the sake of diplomatic correctness, but the real thrust of the policies of both the Whitlam and Fraser governments was to encourage the Suharto Government's position that East Timor should become part of Indonesia and, once the territory had been invaded, to encourage other countries to come to terms with integration, and not to get too upset over its ugly realities. The real thrust of Australian diplomacy in the seventies was therefore to discourage other members of the international community from challenging Jakarta's aggression, and to avoid giving credibility to the reports of gross human rights abuses that were emerging from East Timor at the time.

When the Hawke Government came into office Bill Hayden (then Foreign Minister), and later Gareth Evans, had opportunities to change direction from the shameful compliance of previous governments, but they too succumbed to a kind of cynical opportunism which led to the conclusion of a treaty that in effect disinherited the people of East Timor of their most valuable economic resource, to the great profit of the aggressors. The ICJ decision may delight the oil industry and their political sponsors, but we have nothing to celebrate. The failure of the ICJ to address a deplorable injustice to the people of East Timor is to do with the limitations of its mandate and not with the justice of the matter.

The significance of the recent International Court of Justice ruling

by Pedro Pinto Leite

(excerpts from a paper presented to the Conference "Peacemaking Initiatives for East Timor", Australian National University, Canberra, 10-12 July 1995)

"For Brutus is an honourable man,
So are they all, all honourable men."
(From the speech of Marcus Antonius
in Shakespeare's Julius Caesar, Act III, Scene II)

Last month in Holland, an Australian journalist asked me what kind of verdict one

could expect in the case of Australia v Portugal (...). I answered that as the Court had come so quickly with a decision, I was afraid of a judgement against Portugal. The outcome has confirmed my fears.

On the 30 June the Court handed down a decision which accepted all of the Australian arguments in support of the objection that a ruling on the merits would require it to determine the rights and obligations of Indonesia, and found, by a majority of 14 votes to 2, that it could not exercise jurisdiction in the case. Importantly, it clearly reaffirmed the right of the East Timorese to self-determination.

Whilst strongly disagreeing with the judgement and believing it to be unfair, I came to a more nuanced view after reading the verdict, the separate opinions of Judges Oda, Shahabuddeen, Ranjeva and Vereshtin and the dissenting opinions of Judge Weeramantry and Judge ad hoc Skubiszewski.

I maintain the view that the Court should have dismissed Australia's objections and decided on the merits. However I understand now the doubts of at least some of the judges. It seems to me that the Court's decision not to decide on the merits in such a case of clearly unlawful behaviour by the respondent state, contains an implicit appeal to the international community: that it is time to change the rule of the state's consent to the Court jurisdiction by the so often proposed system of obligatory jurisdiction. (...)

Specially concerned with the possible application by the Court of the principle of the necessary third party, Portugal was very careful in delimiting the application to the actions of Australia. It requested that the Court determine that Australia, by negotiating, concluding and initiating performance of the Timor Gap Treaty and excluding any negotiation with Portugal as administering Power of East Timor, had infringed the rights of the East Timorese to self-determination, to territorial integrity and to permanent sovereignty over its wealth and natural resources, had infringed the powers and rights of Portugal and contravened binding Security Council resolutions. It asked the Court to declare that by those acts Australia had incurred international responsibility and had caused damage, and demanded unspecified reparation to the people of East Timor and to Portugal. It requested that the Court order that Australia had to refrain from all breaches of the concerned rights and from any negotiations in the absence of Portugal. The final Portuguese submissions in oral pleading, repeated the written application.

Portugal did not mention Indonesia - the other party in the Timor Gap Treaty - in the application, nor did it ask the Court to decide on the validity of that treaty. Only the unilateral actions of Australia were referred to.

One of the objections raised by Australia was that there was no dispute between itself and Portugal. During the hearings the Australian representatives stressed the fictitious character of the case, contrasting with what they often called "the real world". As confirmation that the real dispute was between Portugal and Indonesia, they went to the lengths of counting the exact number of times the word "Indonesia" was mentioned in the Portuguese written pleading.

Another, much more important objection was based on the expected argument of the necessary third party, due to the absence of Indonesia in the proceedings.

According to a third objection, Portugal lacked standing to bring the case, as it did not have a sufficient interest of its own to institute the proceedings and had no power to represent the people of East Timor. Further, one could not infer such power from the relevant United Nations resolutions.

Other objections put forward by Australia concerned the allegation that the judgement would serve no useful purpose, as the interests of the East Timorese would not be promoted, or it would not have an useful effect, as it would be not enforceable, and

that the Court was an inappropriate forum to deal with the real matters, which were already under the attention of other United Nations' organs.

The Australian representatives presented their views during the hearings aggressive manner. Being in an uncomfortable position on the substantive matters (and we must also have in mind that the Court had ruled three years ago against Australia in the Nauru case, and Australia had raised the same main preliminary objection), they did not act in a defensive way. On the contrary, they attacked Portugal's intentions, were often provocative and made good use of the media present. The Portuguese team became defensive, insisted on a reserved and polite attitude, almost avoided the media. The tone was set on the first day of the hearings, 30th of January. That day, Christopher Lamb, a legal adviser in the Australian team and its spokesman, surrounded by TV cameras and microphones, described the Portuguese pleading as "an expedition in high school debating society". As far as I know, the provocation passed unanswered. One can possibly explain this by cultural or temperamental differences but during the hearings of the Nauru case Australia has had, if I well remember, a sober performance. In my view, the Australian representatives adopted a deliberately aggressive style: as in football, they chose attack as the best defence. The fact is that it succeeded.

One of the facts which made the Australian Government feel more uncomfortable about being taken before the Court was the lack of support by its own people on this issue. During the hearings IPJET's secretariat received several messages from Australian citizens conveying their hopes that the Portuguese legal team would succeed.

Another aspect of Canberra's difficult position is it's relationship with Indonesia since the conclusion of the Timor Gap Treaty. When dealing in the natural resources of the Timor Gap area with the regime that illegally occupied and annexed East Timor, the Australian Government became, in the suggestive words of the international criminal lawyer Prof. Roger Clark, a "receiver of stolen goods". This obliges Canberra not only to search constantly for excuses (before national and international publics) but places it in a vulnerable position, subject to continuous blackmail from Jakarta.

The Australian Government had reasons to fear that the paramount importance of the right to self-determination would have motivated some judges to give less weight to procedural questions and to be more inclined to rule on the merits.

It was against this background that Foreign Minister Evans came out short before the hearings with an astonishing declaration of facts and law. I would call it a legal Centaur, as it comprises half integration, half self-determination. A similar argument had already been made in the Australia's rejoinder and repeated in oral pleading. I read an explanation of the statement by Minister Evans himself, answering a question of Senator Bourne. In short (and these are now the words of the former Australian ambassador to Indonesia at the time of the invasion of East Timor, Richard Woolcott) the argument reads:

> "Australia has never denied an East Timorese right to self-determination, but holds that now this could be carried out only within the framework of Indonesian sovereignty, just as before 1975 it recognized the reality of Portugal's sovereignty".

It would be quite embarrassing for Minister Evans if the judgement had commented on this statement. As the Court decided not to proceed to the merits, it limited itself to stressing that Australia recognized the East Timorese' right to self-determination, without saying a word on Australia's recognition of East Timor as part of Indonesia (à bon entendeur...). The two dissenting judges, Weeramantry and Skubiszewski, discussed the merits and were thus free to comment the statement: the first criticized it under the heading "The

incompatibility between recognition of Indonesia sovereignty over East Timor and the recognition of East Timor as a non-self-governing territory"; the second also pointed out that in such statement "self-determination is reduced to the choice of the form of government".

It is a question of common sense. If Australia recognizes the right of the East Timorese to self-determination is bound to accept that this people must be free to chose their legal status according to the rules of General Assembly Resolution 1541 (XV). Integration is only one of the possible outcomes of the act by which the Timorese should and will exercise their right. As Judge Weeramantry states in his opinion, "voluntariness (...) is a central feature of self-determination". When Australia recognized *de jure* the integration of East Timor as the 27th province of Indonesia, knowing that no act of self-determination had taken place, it was denying that right.

Also the comparison of this unfortunate act with the Australian recognition of Portugal's sovereignty over East Timor before 1974 is highly misleading. To fully make clear why, let me recall a little of history.

After the military coup of 1926 Salazar seized power in Portugal, one of his first acts was the creation of the so-called "Acto Colonial". The colonies were then called by what they were: colonies. Shortly after the end of the Second World War the first English, French and American colonies in Asia became independent. When Salazar sought the admission of Portugal to the UN in 1946, the veto of the Soviet Union in the Security Council crossed his plans; Portugal's fascist regime and colonial record were the main reasons for the refusal. In December 1955, benefiting from the famous "package deal", Portugal became a member of the UN. By then Salazar had already proceeded to a cosmetic operation: the Constitution of 1933 had been amended in 1951 and under the motto "Unity of the Nation" colonies had become "overseas provinces". Playing with those words, he avoided the subjection of the Portuguese colonies to the regime of Chapter XI of the Charter. But the Conference of Bandung, held in the same year of Portugal's admission to the UN, raised high the ideal of self-determination. Five years later, with the adoption of Resolutions 1514 (XV) and 1541 (XV) that ideal was made an inalienable right by the United Nations. A Special Commission for the Territories under Portuguese Administration was created and soon reported that the relation between Portugal and the "overseas provinces" was of colonial nature, as the population of those territories did not enjoy the same rights of the Portuguese people. The tasks of that Commission were transferred to the Committee of 24 upon its establishment in 1962. The Portuguese dictatorial regime became further isolated with the wave of independencies in Africa and the colonial wars in Angola, Mozambique in Guinea-Bissau. When Marcelo Caetano succeeded Salazar in 1968, he tried a second cosmetic operation, through another revision of the Constitution: the colonies became now "autonomous regions", Angola and Mozambique even "States". The colonial relation, needless to say, remained unchanged. The United Nations again adopted several resolutions condemning the colonial policy of Portugal. No country, except Spain or South Africa, accepted Salazar and Caetano's portrayal of the colonies as an "integral part of Portugal". The international community, Australia included, accepted the sovereignty of Portugal over the colonies, but only as Administering power, thus being under the supervision of the UN, with the obligation to decolonize those territories. By definition, they were not seen as part of Portugal but as separate entities. Only in these terms, did Australia accept the sovereignty of Portugal over East Timor.

A very different situation is faced today. Australia recognized *de jure* the integration of East Timor in Indonesia, as a province, as the very title of the Timor Gap Treaty reveals: "Treaty between Australia and the Republic of Indonesia on the zone of co-operation in an area between the Indonesian Province of East Timor and Northern

Australia". Prof. Dupuy made that point very clearly on the last day of the Portuguese oral pleading. The only two judges who addressed the question agreed with him. Judge Skubiszewski recalled, with regard to this, the rule of the Friendly Relations Declaration, which Portugal has complied with since 1974 : that a colony or a non-self-governing territory has under the charter a separate status from its administering power and that such status shall exist until the people of the territory have exercised their right to self-determination. To equalize both situations, as Minister Evans did, is nothing more nothing less than which Salazar and Caetano had tried unsuccessfully. (...)

Some last remarks evaluating the judgement and considering its impact on the necessary resolution for the problem of East Timor.

As stated, I consider this Judgement to be unfair, especially for Portugal. I cannot but agree with Judge Weeramantry when he concludes that the Monetary Gold principle is not relevant to this case, as the Court could have reached a decision based on the obligations of Australia alone, without needing to judge on the behaviour of Indonesia which was not the subject-matter of the case. Besides, the principle of the individual responsibility of States for their actions is the norm, and should have been applied here. Especially when, as in this case rights of *erga omnes* are involved.

What the Court in fact did was to deviate from the narrow interpretation of the Monetary Gold doctrine (as in the decision on the Nauru case), and apply a broader interpretation of the doctrine. That was particularly unfortunate, because the rights at stake (self-determination, sovereignty over the natural resources), as the Court itself admitted, are of paramount importance.

During a colloquium at the University of Leiden, held on the last day of the hearings, I commented that a negative decision of the Court could have a pernicious consequence: countries which accept the compulsory jurisdiction of the Court could be tempted to conclude treaties with those who don't, for the performance of acts which could otherwise bring them before the Court. In other words, treaties as an assurance police against trials. In his dissenting opinion Judge Weeramantry expresses the same concern and gives a number of examples. Needless to say, that would be a bad development in a time that, more than ever, the authority of the International Court of Justice should be enhanced.

For the cause of East Timor, this judgement was after all not so bad. The right of the East Timorese to self-determination was reaffirmed: not only "for the two Parties", as one could think when reading those words in paragraphs 31 and 37, but for the United Nations and thus the Court itself. One cannot interpret those lines separated from the rest of the judgement, and the second part of paragraph 31 is very clear (...)

As Dr Iain Scobbie (...) noted in a comment to the Judgement, this ruling on self-determination was strictly unnecessary. It is in fact a gesture to the East Timorese. The consequence of the Court's characterization of self-determination - as a right *erga omnes* - is that such right is binding on all states, thus also on Indonesia. (...)

One can wonder why the Court did not go further. Impotence? Or inspired by Marcus Antonius during his famous speech in Shakespeare's 'Julius Caesar' is it inviting public opinion to grow?

A reminder about IPJET book "International Law and the Question of East Timor"

There are only a few hundred copies of this publication remaining from the 1250 ordered by IPJET. Members not wishing to miss out on a copy should fill out the attached order form and forward it along with payment to the following people:

a) in Portugal:

Dr. Jorge Teixeira Lapa
R. Pascoal de Melo, 134, Cave Esq.
1000 Lisboa
Tel: (01) 52 43 76 / 52 96 74
Fax: (01) 315 68 36
E-mail: jtlapa@individual.puug.pt

1 copy - 2000$00
3 copies - 4000$00
payment (added with postage and packing costs, when necessary) to Plataforma Internacional de Juristas por Timor Leste, conta 047/575/000.4 do Banco Espírito Santo e Comercial de Lisboa.

b) in Holland:
Secretariat IPJET
Gruttohoek 13
2317WK Leiden
Tel and fax: (071) 221065
E-mail: ipjet@antenna.nl
1 copy - *f* 20.00 (+ p&p *f* 7.50)
3 copies - *f* 40.00 (+ p&p. *f* 10.00)
payment (added with postage and packing costs, when necessary) to IPJET, Leiden, giro account nr. 5800721

c) in the U.S.A. and Canada:
ETAN/US
P.O.Box 1182
White Plains, NY 10602, U.S.A.
Tel (1)(914) 428 7299
Fax (1)(914) 428 7383
E-mail: cscheiner@igc.apc.org
1 copy - US$ 13.50 (+ p&p US$ 5.00)
3 copies - US$ 27.00 (+ p&p US$ 15.00)
payment (added with postage and packing costs, when necessary) by cheque made out to East Timor Action Network, White Plains, NY.

d) in other countries:
Secretariat IPJET
Gruttohoek 13
2317WK Leiden
Netherlands
Tel and fax: (31)(71) 221065
E-mail: ipjet@antenna.nl
1 copy - US$ 13.50 (+ p&p US$ 7.50 Europe, US$ 10.00 world)
3 copies - US$ 27.00 (+ p&p US$ 12.00 Europe, US$ 21.00 world)
payment (added with postage and packing costs, when necessary) by cheque payable to Pedro Pinto Leite, International Platform of Jurists for East Timor, Leiden, Netherlands. The books are posted by airmail within Europe and by SAL - Surface mail Air Lifted -, whenever possible, to countries outside Europe.

Australian Conferences

The Secretary of IPJET recently attended four conferences in Australia. There was a strong IPJET presence at each conference resulting in an increase of platform membership by at least 10 members with many other expressions of interest by eminent jurists.

The first conference attended was titled "The United Nations: Between Sovereignty and Global Governance?" and held on 2-6 July at La Trobe University, Melbourne. This conference was arranged to commemorate the UN's 50th anniversary. The East Timor question was not one of the formal subjects of the conference. However it was present at the plenary session and some of the work shops. Gareth Evans, the Australian Minister for Foreign Affairs and Trade addressed the conference and met with vocal demonstrations by East Timorese. The demonstrations and the publicity arising from them influenced Australia's decision to request that Indonesia withdraw its nomination of General Mantiri as the future Ambassador to Australia.

The next conference attended was "Peacemaking Initiatives for East Timor" held at the Australian National University between 10-12 July. The conference was marked by strong participation by East Timorese and courageous statements by Armindo Maia from the University of East Timor.

The following conference was held at the University of New South Wales between the 12th and 16th July and called "The Australian Model United Nations Conference 1995". One of the two cases run by the model International Court of Justice was the Portugal v Australia. Two IPJET members, Pedro Pinto Leite and Professor Barbedo de Magalhães, gave speeches on the background of the East Timor problem.

The last conference attended was the "Darwin Conference on Indonesia & Regional Conflict Resolution" from 25 to 28 July 1995. This conference was organised by the very active Australian solidarity groups and marked by the strong presence of Indonesian democrats.

The VII Symposium of the Oporto University in collaboration with IPJET

We have already arranged for colloquia at several universities which will be held in connection with the 7th Symposium as a result of our appeal in Newsletter 5. Those who have not reacted yet are encouraged to contact the Secretariat if they are interested in participating in this project.

The next General Assembly of IPJET: 6-7 December, in Las Palmas (Canary Ils.)

Contrary to previous advice, the General Assembly of IPJET will not take place in Manila as CNRM and solidarity groups have decided not to organise a big event there. They have decided instead to encourage a number activities all around the world.

In order to combine our assembly with the preparations for the establishment of an International Platform of Jurists for Western Sahara (see Newsletter 5) the council has decided to hold the GA meeting in Spain. An additional reason for this is that Spain currently holds the presidency of the European Union.

Thus the conference will be held on the 6-7 December in Las Palmas, Canary Islands, as financial and other support has been promised from the Cabildo of Grand Canaria. An additional reason is that there is a large number of Sarawi refugees and an active group of solidarity jurists living in that city.

Another advantage of this location is that cheap charters (from many towns in Europe at least) and cheap accommodation are available. Those who are interested in participating should make inquiries of their local travel agents and convey them to the Secretariat. Those prices may then be compared to those available in Holland so that the best possible travel and accommodation arrangements can be made. Initial inquiries in Holland indicate that a package deal inclusive of return charter airfares from Amsterdam plus one weeks accommodation, excluding meals, cost approximately $US 410.

The proposed agenda for the General Assembly meeting will be:

1. Changes to the composition of the Council including:
   i. The return of Gerry Simpson to the Council;
   ii. The inclusion of Paulo Remédios to the Council for the area of China, Japan, and Korea;
2. Approval of the Reports of Activities years 1993 and 1994;
3. Approval of Financial Balance for years 1993 and 1994;
4. The membership status of Abílio Araújo (according to a proposal which will be submitted by the International Council);
5. Policy and future activities of IPJET;
6. Remembrance of the 20th anniversary of the invasion of East Timor with a special ceremony.

Please send your suggestions regarding the agenda and specific suggestions under point 5, before 15 November.

The Inter-parliamentary Conference on East Timor: the Lisbon declaration

The first Inter-parliamentary Conference on East Timor, which took place in Lisbon from 31 May to 2 June (see Newsletter 5), adopted unanimously the following declaration:

"= LISBON DECLARATION =

The Lisbon International Inter-Parliamentary Conference was primarily aimed at helping the people of East Timor to win their fight for freedom.

On December 1975 the Republic of Indonesia invaded and occupied East Timor in violation of the United Nations Charter.

The People of East Timor were prevented by force from exercising their right to self-determination.

The U.N. General Assembly and Security Council immediately condemned the aggression perpetrated by the Republic of Indonesia.

The Republic of Indonesia annexed the East Timor territory and subjected its People to a genocide policy which has caused more than 200,000 deaths.

The Republic of Indonesia is unwilling to abide by the Resolutions adopted by the United Nations and attend to the appeals made by the International

Community, while refusing to recognise Portugal's Status as Administering Power of the East Timor territory in charge of promoting the self-determination process of its People.

In view of the existing situation, the participants in the Lisbon International Parliamentary Conference

1. Exhort the Republic of Indonesia to abide by the U.N. Resolutions on East Timor;
2. Call on the United Nations to ensure the respect for human rights in East Timor;
3. Urge the U.N. and all Governments and Parliaments of the Countries which have been selling arms to Indonesia to take measures aimed at en forcing an embargo to such trade, condemned by European Parliament and by the International Community;
4. Demand the immediate release of Xanana Gusmão and all Timorese political prisoners held in custody in Indonesia and East Timor;
5. Urge the UN Member States, namely the powers with an influence in the area, to cooperate in the search for an internationally acceptable solution that enables the East Timorese People to exercise their inalienable right to self-determination;
6. Request the United Nations to proclaim the 7th of December as the International Day of East Timor;
7. Pay tribute to heroic and tragic sage of the people of East Timor, in their struggle for freedom and the preservation of their centuries-old identity.

Inter-parliamentary Conference on East Timor: SUGGESTIONS FOR AN ACTION PLAN ON EAST TIMOR

ACTION WITHIN NATIONAL AND SUB-NATIONAL PARLIAMENTS

1. Propose Parliamentary resolutions calling for the exercise of the right to self-determination by the people of East Timor and related action;
2. Propose Parliamentary missions to visit Indonesia and East Timor in order to inspect and report upon the position of human rights, the rule of laws and the demand for self determination by the people of East Timor;
3. Establish Parliamentary Committees to receive reports and focus attention upon the position of East Timor in international law and in respect for human rights;
4. Raise the issue of East Timor in Parliamentary committees of Amnesty International supporters; circulate amongst Parliamentarians the reports (or Summaries of the reports) of Amnesty International, the International Commission of Jurists; the International Platform of Jurists for East Timor and other human rights NGOs Concerned with East Timor:
5. Raise the issue of the rights of the people of East Timor in correspondence, and at meetings with, the representatives of the western and other countries which are the major investors in Indonesia;
6. Make contact with the Parliamentary groups concerned with the rights of the people of Tibet, the Kurds, Western Sahara and other peoples denied their right to self-determination. Make common cause with such groups and find and express the common principles of International law and justice raised by cases with issues similar to those raised by the case of East Timor;

ACTION WITHIN THE UNITED NATIONS

7. Inform the Secretary-General of the United Nations of the initiatives of Parliamentarians, Parliaments and Parliamentary Committees;
8. Request the Secretary-General of the United Nations to call on the Government of Indonesia to comply with the recommendations of the Special Rapporteur on Summary Executions which have so far been ignored;
9. Request the Commission on Human Rights to call on the Government of Indonesia to report to the Commission on Indonesia's compliance with the recommendations of the Special Rapporteur;
10. Request the High Commissioner for Human Rights of the United Nations to visit East Timor and to report to the Secretary General, the Commission on Human Rights and the International Community upon the compliance by

Indonesia with:

* The report of the Special Rapporteur on Summary Executions, etc;
* The reported abuses of fundamental human rights; and
* The conformity of Indonesia with the duty to accord to the people of East Timor the right to self-determination accorded to them by International Law.

OTHER ACTION

11. Introduce motions or legislation on a selective arms embargo, or to forbid the sale of arms to countries which offend international law on human rights and on the right to self determination of peoples, including Indonesia in respect of East Timor.
12. Establish an information exchange to distribute Parliamentary resolutions in Parliaments concerned;
13. Establish a media exchange to provide local media with material collected internationally, to support the struggle of the people of East Timor and to help explain that struggle, and the right of the people of East Timor, to the people of the democracies which will help alter government and private sector inaction over East Timor.
14. Establish a central point for gathering sound, confirmed data on the current situation in East Timor as a basis of practical action in the Parliaments of democracies.
15. Make representations to the International Committee of the Red Cross and UNICEF to increase their presence in. and activities for, East Timor and its people;
16. Consider actions which will persuade democratic Governments to recognise the freedom movements in East Timor as the true representation of the people of East Timor.
17. Urge Parliamentarians to join the organisation " Parliamentarians for East Timor" (PET) and encourage its institutional support to the rights of the people of East Timor and for future meetings of Parliamentarians who support the rights of the people of East Timor;
18. Establish attention to the role of the International Bank for Reconstruction and Development (World Bank) in the Indonesian economy and in its role in East Timor;
19. Encourage the European Parliaments in particular, to raise issues of East Timor in the organs of the European Union and in the European Parliament and especially to persuade the Government and the Parliament of the Netherlands to embrace the cause of the rights of the people of East Timor to self-determination and to the respect for their individual human rights.
20. Consider use of the Convention on Genocide in respect of alleged cases of genocide by Indonesia and its military forces and officials in East Timor. Encourage and organise the collection of depositions, including from refugees from East Timor, on instances of genocide and on cases of violations of fundamental human rights. Press for the establishment of an International Penal Tribunal or a Special Penal Tribunal for East Timor and encourage steps to gather the evidence for use by such tribunals once established;
21. Distribute the addresses and fax contacts of participants in this Conference to retain a network of the Parliamentarians and other persons dedicated to law and justice in East Timor which will endure after the meeting has concluded;
22. Call on the Indonesian Government and Parliament in Indonesia and elsewhere to respect the rights of Members of the Indonesian Parliament to speak freely in the cause of human rights in Indonesia and in favour of the rights of the people of East Timor to self determination and to respect for their individual human rights:
23. Call on the Inter-parliamentary Union (IPU) to add the issues of East Timor to the active concerns of the IPU;
24. Propose resolutions calling on the President and Government of Indonesia to release Xanana Gusmão from prison immediately and without preconditions; and
25. Encourage the establishment of an International Eminent Persons Group to participate in the just resolution of the demand of the people of East Timor to self-determination and, to that end, to visit and consult with Xanana Gusmão.

ON PARLIAMENTARIANS FOR EAST TIMOR

This Inter-Parliamentary Conference on East Timor, (...)

1. calls for an International Board of Parliamentarians for East Timor, with representatives of each of the main regions of the world, with a view to developing communications between national groups and promoting initiatives decided by the Board;

2. appreciates the work already being done by the Secretariat of PET in Ottawa, Canada, and proposes that the Secretariat be asked to circulate the decisions of the International Board, as well as general information on East Timor, to all the national groups, and to develop electronic communications between the Secretariat and the national groups;

3. establishes a steering committee of Parliamentarians from Portugal, Japan, Australia and the UK to convene the International Board and to develop strategies for resourcing these initiatives."

Repercussions of the Inter-parliamentary Conference on East Timor

The Irish Times of 15 June reported: "Norris calls for tribunal on East Timor genocide - Independent Senator David Norris yesterday called on the Government to take up the offer of a disinguished American law firm to assist it in taking a case against what he described as "the Indonesian dictatorship" on a charge of genocide in East Timor.

Mr. Norris said at the recent Lisbon conference on East Timor (...) one of the distinguished American judges had offered his firm's services free of charge. (...)

The Senate was discussing a motion in the names of an all-party delegation to the Lisbon conference. It called on the Government to take all necessary steps to ensure the implementation of the Lisbon Declaration to secure freedom and self-determination for the people of Timor.

The Minister of State for Foreign Affairs, Ms Joan Burton, said the Government could support the Declaration, which was adopted unanimously by the conference. It urged the UN and all governments and parliaments of the countries which have been selling arms to Indonesia to put an embargo on such trade.

The Government was well aware of the role played by the Indonesian military forces in maintaining control over East Timor, and would fully support such sanctions. It was also prepared to raise the matter with its partners in the European Union.

She added that it was essential that the Timorese leader, Mr. Xanana Gusmao, and other political prisoners be released.

Mr. John Dardis (PD) said that it was important that national parliaments adopted and supported the Lisbon Declaration. Its authority, he said, would be greatly strengthened by the Senate giving it unanimous support.

Ms. Madeleine Taylor-Quinn (FG) supported a tribunal for East Timor to process human rights violations. She condemned EU aid To Indonesia for forestry development.

The motion was passed unanimously."

And on the 21th of September, Lusa reported: "The European Parliament issued a resolution today in which it appeals to the 15 member countries of the European Union to suspend economic cooperation, arms sales, and military assistance to Indonesia while occupation of East Timor persists.

The EP resolution condemns "severely" the repression by the Indonesian military in East Timor, and expresses solidarity with its victims. The resolution reiterates EP support for the East Timorese right to self-determination, and calls for the participation of East Timorese representatives in the UN-sponsored talks between Indonesia and Portugal."

IPJET NEWSLETTER
This issue was written by:
Pedro P. Leite, Magda Karagiannakis

IPJET Secretariat
Gruttohoek 13
2317 WK Leiden
Netherlands

Tel/Fax: +31-71-5221065
E-mail: ipjet@antenna.nl
Postbank giro nr. 5800721